The People's contention in this regard is this: The 605 of the Federal Communications Act that was before the Court in *Lee* v. *Florida*, ([1968] 392 U.S. 378) was inapplicable on May 26, 1970, when Judge Kelly granted a motion to suppress the wiretap evidence, and on July 31, 1970, when the indictment was dismissed because predicated on inadmissible wiretap evidence alone. The undisputed fact is § 605 as it existed from 1934 was repealed on June 19, 1968, two days after the *Lee* decision by Congress in connection with the enactment of the Omnibus Crime Control and Safe Streets Act (Chapter 119, Part I, of Title 18, U.S.C. 82, Stat. 212-215; Public Laws 90-351).

It is undisputed the 605 before the Supreme Court in *Lee* v. *Florida* (supra) simply did not exist in 1970 when the wiretap evidence in this case was suppressed and this indictment dismissed. It is uncontroverted that in its place Congress substituted comprehensive practice statutes (Safe Streets Act) providing for wiretapping in certain cases under definitive controls.

When this case was decided by the Appellate Division of the Supreme Court on March 15, 1961, the 605 before this Court in *Lee* had been off the books, so to speak, approximately 18 months and yet it was said by the Appellate Division to survive.

It is most respectfully submitted there is neither precedent nor reason for this alarming conclusion (*Fuller* v. *Alaska, supra,* notwithstanding; *Desist* v. *United States* [1969] 394 U.S. 244; *Kaiser* v. *New York* [1969] 394 U.S. 280).

In the first place, the *abatement argument* was neither briefed nor argued in the *Fuller* case before this Court. The record reveals this Court summarily reversed in *Fuller* on the petition for certiorari without the briefing and oral argument indidental to plenary review.

Secondly, the doctrine of the *Fuller* case cannot be said to survive because of the thorough treatment of the prob-

lem subsequently in *Desist* (394 U. S. 244) and *Kaiser* (394 U. S. 280). The Court there concluded the effective date for the new court rules dealing with wiretapping and eavesdropping was not the date of the trial as decreed in *Fuller* but the police action to be challenged. Where the police, as in this case, acted in reliance on decisions of this Court, they ought not to be penalized regardless of the trial date.

It may be that the police action here challenged should be tested by the Safe Streets Act including 605 as amended. That will have to await a different case for it suffices to say *no* such testing was ever done in this situation. There has been no determination that the Safe Streets Act is to be given retroactive effect; there has been *no* determination that the affidavits and orders here challenged do not comply substantially with the requirements of the new federal statute; there has been *no* determination that the police action here questioned does not measure up to the material requirements of the Safe Streets Act. All we have is a bare decision that 605 though amended to provide for court ordered wiretapping on June 19, 1968, survives in its original form to outlaw it. This Court ought not to sanction such a contradiction.

CONCLUSION

The petition should not be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the New York State Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

APP.T.2.No.32. 71

—o—

THE PEOPLE &c.,

Respondent,

vs.

BENJAMIN FEINLOWITZ,

Appellant.

—o—

JASEN, *J.*:

The crucial issue in this case concerns the admissibility of certain recordings of defendant's voice obtained as a result of a wiretap made pursuant to court order. We conclude that the admission of the evidence was violative of neither the constitutional nor statutory rights of defendant and that, consequently, his conviction should be affirmed.

In May of 1966, the Mount Vernon Police Department received a tip from an informant, who had previously proven reliable, that a public telephone in George's Pharmacy was being used to transmit horse racing and sporting bets. A detective assigned to observe this location noticed defendant, a known and convicted gambler, repeatedly leave his office (where there was a telephone) and use this public phone booth. Moreover, on one occasion, he overheard defendant discussing baseball lines and quoting odds on that day's games. On the basis of this information, the police secured an order from the Westchester County Court authorizing them to intercept and record conversations over that telephone line.

Appendix A

Pursuant to that order, a tap was installed on May 18, 1966, and was frequently monitored by the police. On June 15, the tap was being monitored by Detective Burke, who overheard several sports bets being transmitted. He immediately contacted two other officers, who then entered the pharmacy and went to the telephone booth. These officers possessed a search warrant authorizing them to search defendant's person. They discovered defendant in the phone booth with the receiver in his hand and with an envelope and two slips of paper laying nearby. He was asked to step out of the phone booth, where a search of his person revealed $1,495.42 in cash and several other slips of paper. An additional $5,000 in cash was found in the envelope and all of the slips contained sports bets and gambling odds.

The tape of defendant's telephone conversation, which was introduced over his objection at trial, revealed the taking of several bets. Detective John Roach identified one of the records introduced in evidence as a record of the three team parlay bet which the taped conversation concerned. Richard Burke, the detective who made the recording, identified the voice of the defendant on the tape as the receiver of this bet. Also, at the trial, Stephen Fein, the defendant's son, testified in his father's defense. He contended that the cash possessed by defendant was the proceeds of a loan which he (Fein) had obtained to purchase certain machinery for his business. However, no business records were produced to verify this claim.

Upon this record, defendant was convicted by the City Court of Mount Vernon of the crimes of bookmaking and possession of bookmaking records (former Penal Law, §§ 986, 986-b). For these convictions, defendant was sentenced to concurrent terms of thirty days imprisonment.

The defendant argues on this appeal that the introduction of evidence obtained by wiretapping was constitutionally impermissible and should have been excluded at

the trial. In addition, the defendant urges that the order authorizing the telephone interception was void because it violated section 605 of the Federal Communications Act.

At the time the authorized telephone interception occurred, there were no significant Federal constitutional restraints relative to securing and using wiretap evidence. The basic pronouncement by the Supreme Court in this area remained *Olmstead* v. *United States* (277 U. S. 438), which explicitly held that a wiretap, conducted a physical intrusion into the defendant's premises, was not an unlawful search and seizure within the meaning of the Fourth Amendment. It is thus clear that at the time the wiretap occurred, the intrusion did not violate the *Olmstead* rule. Moreover, at the time, such conduct in New York was regulated by section 813-a of the Code of Criminal Procedure, which specified procedures for obtaining a court order authorizing a wiretap. There is no contention made here that the dictates of that section were not scrupulously followed.

However, the period between the seizure of the evidence and the judgment of conviction [1] was a time of rapidly changing constitutional interpretation in this area. *Katz* v. *United States* (389 U. S. 347) specifically invalidated the long-standing *Olmstead* rule and declared that nontrespassatory seizures were also constitutionally protected. Additionally, in *Berger* v. *New York* (388 U. S. 41), the Supreme Court declared that section 813-a of the Code of Criminal Procedure was at least partially unconstitutional for its overbreadth.[2]

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[1] The conversation was recorded June 15, 1966, and defendant was convicted July 31, 1969.

[2] The New York Legislature responded to this decision by enacting Title III of the Code of Criminal Procedure (§§ 814-825), which contains provisions designed to meet the constitutional objections enunciated in the *Berger* case.

Consequently, the specific problem arising out of this rapidly changing complex of decisional law is to determine precisely what constitutional rule is applicable to this prosecution. The Supreme Court has addressed itself to this perplexing question in two recent cases and, seemingly has provided a rather clear answer. In *Desist* v. *United States* (394 U. S. 244), the Court held that *Katz* is to be applied prospectively only. This was further explained in *Kaiser* v. *New York* (394 U. S. 280) to mean that if "the wiretapping in this case occurred before *Katz* was decided and was accomplished without any intrusion into a constitutionally protected area of the petitioner, its fruits were not inadmissible under the exclusionary rule of the Fourth and Fourteenth Amendments." (394 U. S. 280, 282.) *Kaiser* also instructs us that the *Berger* decision is not applicable retroactively. The Court there affirmed a decision of this court (see 21 N Y 2d 86) wherein wiretap evidence had been seized pursuant to section 813-a—later declared unconstitutional in *Berger*. The Supreme Court, thus, affirmed our holding that the *Berger* decision should be given only prospective application (21 N Y 2d at 98).

A careful examination of the *Desist* and *Kaiser* decisions reveals that the determinative factor in both cases centers on the date upon which the seizure of the evidence occurred. (See, 394 U. S. at 282.) Hence, if the evidence was seized in a manner constitutionally permissible at the time of seizure, it will subsequently be allowed into evidence at the defendant's trial even though changing constitutional interpretations have since made a similar seizure impermissible.[3] Since it cannot be seriously contended here that

[3] The rationale behind such a dichotomy is quite apparent. The deterrent purpose of an exclusionary rule such as this would not be furthered by excluding evidence seized in a manner that was constitutionally acceptable at that time. Moreover, an exclusionary rule has no real bearing on guilt or the fairness of the trial. (*Linkletter* v. *Walker*, 381 U. S. 618, 638-639.)

the seizure was constitutionally defective by 1966 standards, we conclude that the recordings were properly allowed into evidence at defendant's later trial.

While it is true that the wiretap order was issued in 1966 under a subsequently declared unconstitutional law, the basis upon which it was authorized closely approximates the standards set forth in *Berger*. A close examination of the *Berger* decision reveals that the major constitutional objections to section 813-a were twofold—the fact that the statute only required a reasonable ground to believe that a crime had been committed (rather than probable cause) and a lack of particularity in description of what was to be seized and the evidence sought. Here, there obviously was probable cause for the seizure by reason of the extensive observation of defendant's suspicious activities. Defendant, a known and convicted gambler, was seen to frequently use a public telephone booth, despite having access to a private telephone at his office. Upon one occasion, a police officer personally heard defendant discussing sports lines on baseball games and quoting odds on the day's games to someone with whom he was in contact on that telephone. Thus, the primary constitutional defect denominated in the *Berger* case was certainly not present here. Moreover, the affidavit in support of the wiretap order specifically described the defendant and his suspected gambling activities, including the specific location to be observed. Under such circumstances, any deviation from the standards enunciated in *Berger* and *Katz* must be considered as harmless in light of the overwhelming evidence against defendant.

We turn then to the second question posed—that the introduction of the wiretap evidence was prohibited by section 605 of the Communications Act of 1934 (47 U. S. C. 605). Section 605, as it read in 1966, stated, in pertinent part, that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or mean-

ing of such intercepted communication to any person." This section has been interpreted to prohibit all wire tapping of telephonic communications (see, *Pugach* v. *Sullivan*, 180 F. Supp. 66, affd. 365 U. S. 458; *Diamond* v. *United States*, 108 F. 2d 859), except where one party consented to the interception (*United States* v. *McGuire*, 381 F. 2d 306, 314, cert. den. 389 U. S. 1053). This ban upon the interception and divulgence of communications applied to both intrastate and interstate activities. (*Weiss* v. *United States*, 308 U. S. 321; *People* v. *Broady*, 5 N Y 2d 500, cert. den. 365 U. S. 8.)

While the Supreme Court has long held that evidence seized in violation of section 605 was inadmissible in a Federal court (*Nardone* v. *United States*, 302 U. S. 379), it specifically ruled that section 605 "does not exclude such evidence in state court proceedings" (*Schwartz* v. *Texas*, 344 U.S. 199). Thus, at the time the wiretap order was issued in this case, such action was in violation of section 605, but the evidence was admissible in a state criminal proceeding.

After the federal exclusionary rule had been made applicable to the state by *Mapp* v. *Ohio* (367 U. S. 643), the Supreme Court took occasion to reconsider *Schwartz*, in *Lee* v. *Florida* (392 U. S. 378, decided June 17, 1968), holding that evidence seized in violation of section 605 was also inadmissible in state criminal proceedings. In *Fuller* v. *Alaska* (393 U. S. 80), the Court held that *Lee* should be given only prospective effect and "applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*." (*Id.*, at 81.)

Consequently, defendant argues that *Lee* and *Fuller* mandate the exclusion of the wiretap evidence here. We cannot agree. Two days after *Lee* was decided, the Omnibus

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[4] Public Law, 90-351.

Crime Control and Safe Streets Act of 1968[4], which included substantial amendments to section 605, became law. In Title III, Congress for the first time enacted a comprehensive scheme authorizing the interception of telephonic communications and specifically authorized the introduction of overheard evidence in court under denominated comprehensive standards. (18 U. S. C. 2511-2519.)

Therefore, the question posed is whether section 605, as amended, bars the introduction of evidence obtained as a result of a court-ordered wiretap authorized prior to the amendment.

We believe that Congress did, in fact, intend to sanction prior wiretapping as indicated by its findings enacted as section 801 of the Omnibus Crime Control and Safe Streets Act of 1968, wherein Congress found:

"(a) * * *

"There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of the communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce * * *

"(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized inter-

ception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

"(c) Organized criminals make extensive use of wires and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice."

These legislative findings, made prior to the *Lee* decision, at a time when *Schwartz* was still viable, seem to clearly indicate the acceptance by the federal legislature of the then generally accepted practice of introducing in state courts the fruits of court authorized wiretaps. There can be no doubt that the purpose of the exclusionary rule enunciated in *Lee* was to enforce compliance with the Federal Communications Act. This rule was built upon an assumption —enunciated in the *Nardone* case—that Congress intended to bar wiretapping by enacting section 605 in 1934. The error in the assumption, however, became apparent subsequent to the Supreme Court's decision in *Lee* when the Congressional findings enacted as section 801 of the Omnibus Crime Control and Safe Streets Act of 1968 made it abundantly clear that the Court had been misreading the Congressional silence in the years since the decision in *Schwartz*. (Cf., Black, J., dissenting in *Lee* v. *Florida*, *supra*, at 387-388.). Thus, the enactment of the Safe Streets Act should remove any doubt as to the intent of Congress in this area of the law, and it axiomatic that on questions of legislative intent, the Legislature is supreme.

To exclude the wiretap evidence in this case on the basis of *Lee* would, in effect, be enforcing a statutory policy, since substantially modified and no longer applicable. We believe the well-established rule, that we give effect to the law as it exists at the time of our decision, should be adhered

to. (*People* v. *Loria*, 10 N Y 2d 368, 370; *Knapp* v. *Fasbender*, 1 N Y 2d 212, 243.)

The question remains as to whether strict compliance with the provisions of the Safe Streets Act or the newly-amended Code of Criminal Procedure is necessary in this case. We think not and hold that in seizures made before the effective date of the Safe Streets Act, substantial compliance with its provisions is all that is required to bring the evidence within the newly-enacted exception in section 605. The crucial fact is that Congress has clearly indicated a policy to allow courtroom use of judicially supervised and controlled wiretaps. Thus, in light of this clearly enunciated policy, it would seem to defeat congressional intent to require a technical compliance with Chapter 119 since this would result in the virtual inadmissibility of almost all wiretap evidence obtained before the passage of the Act. Consequently, if on such wiretaps there is a clear showing of substantial compliance with the new standards, the evidence will be deemed admissible.

There can be little doubt that such substantial compliance was present here. The wiretap was obtained under judicial supervision, in full compliance with section 813-a of the Code of Criminal Procedure, with probable cause for the seizure clearly indicated. Thus, there seems to be no valid reason to exclude such evidence especially since the police acted in full compliance with both constitutional law and the statutory law of our state as it existed at that time.

We have examined the other contentions raised by defendant and find them to be without merit.

Accordingly, the judgment of conviction should be affirmed.

Appendix A

BURKE, J. (Dissenting):

The majority holds that wiretap evidence, obtained years ago in violation of existing law and inadmissible under the standards established by the Supreme Court, is now admissible at a trial in 1971. We believe that such a holding is clearly in conflict with the decisions of the United States Supreme Court, and, therefore, dissent and vote to reverse.

In *Fuller* v. *Alaska* (393 U.S. 80 [Oct. 1968]), the Supreme Court held "that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in [*Lee* v. *Florida*, 392 U.S. 378]" (p. 81—June 17, 1968). The trial of defendant Feinlowitz commenced on May 22, 1969, almost a year after *Lee* was decided. Inasmuch as *Fuller* was decided after the enactment (June 19, 1968) of the Safe Street Act (18 U.S.C. § 2513 et seq.), it is not for this Court to say that the Supreme Court's decision is no longer viable. Whether or not, in view of the Safe Street Act, the *Fuller* holding was advisable is a question properly addressed to the Supreme Court of the United States. To put it another way, the question is simply not open to us. This case does not require a determination of the effect of *subsequent* legislation upon a Supreme Court decision. The *Fuller* case was decided after the Safe Street Act had been enacted into law. We may not assume that the Supreme Court did not consider the applicability of its provisions.

Nor is an affirmance indicated by the Supreme Court's later decision in *Desist* v. *United States* (394 U.S. 244). In that case the trial took place before *Lee*. In *Desist*, unlike *Fuller* (*supra*), the Supreme Court held that the prospectivity of *Katz* v. *United States* (389 U.S. 347) would be measured from the date of seizure, the result which the majority reaches herein. Although there is mention of the

prospectivity of *Lee*, no change was made in the specific holding of *Fuller*. Moreover, the reasoning which supported the *Desist* holding is inapposite herein. The date of seizure was selected because the exclusionary rule of Katz was not foreshadowed by the prior decisions, and it could not be said that the conduct was in knowing violation of constitutional requirements (*Desist* v. *United States*, *supra*, p. 254). On the contrary, the proscription of section 605 of the Federal Communications Act (47 U.S.C. § 605) against interception of telephonic communications had been the law for many years prior to the *Lee* decision. Judicial integrity, the lack of enforcement of the federal statute and the disrespect for the federal statute shown by state officials (*Lee* v. *Florida*, *supra*, pp. 385-86) impelled the decision. In view of *Mapp* v. *Ohio* (347 U.S. 643) and its progeny, this result was predictable.

The evidence in this case was not only illegally obtained, but illegally divulged by the police to the District Attorney, to the Grand Jury and to the Trial Jury. (Section 605, Federal Communications Act.) Even under the majority reasoning a crime was committed. Under our law there are penal and civil remedies against the police and district attorneys (*People* v. *Defore*, 242 N.Y. 13, 19, 24; *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 39 LW. 4821, June 21, 1971).

In *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 the Supreme Court said: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all." See *Nardone* v. *United States*, 308 U.S. 388; *Benanti* v. *United States*, 355 U.S. 96. *Lee* made it clear that a change in public policy was effected, making all the judgments of the Supreme Court of the United States binding on the states, and gave notice to all state officials and courts.

Accordingly, we believe that the judgment should be reversed.

* * *

Judgment affirmed. Opinion by Jasen, J. All concur except Burke, J., who dissents and vote to reverse in an opinion in which Fuld, Ch. J., concurs.

APPENDIX B

Opinion of Appellate Division

Appeal by the People, (1) as limited by their brief, from so much of an order of the County Court, Nassau County, dated May 26, 1970, as granted the branch of a motion of defendants Iannacone and Kagan which was to suppress all evidence obtained as a result of electronics eavesdropping (wiretapping) concerning indictment No. 23,911; and (2) from a further order of the same court, dated July 31, 1970, which granted said defendants' motion to dismiss said indictment.

Order dated May 26, 1970, affirmed insofar as appealed from and order dated July 31, 1970, affirmed, both affirmances with leave to the People to resubmit the case to another grand jury, if they be so advised. No opinion.

RABIN, *P. J.*, LATHAM, CHRIST and BRENNAN, *JJ.*, concur.

BENJAMIN, *J.*, dissents and votes to reverse the order dated May 26, 1970 insofar as appealed from, to reverse the order dated July 31, 1970, and to deny appellants' motions (1) to suppress evidence as to indictment No. 23,911 and (2) to dismiss said indictment, with the following memorandum:

In November and December, 1966 a County Judge of Nassau County signed orders authorizing the police to tap two telephones. In April, 1967 respondents were indicted for arson on the basis of evidence obtained through these wiretaps. In 1966 and 1967 evidence obtained by such wiretaps was considered admissible in state criminal trials (Schwartz v. Texas, 344 U.S. 199). But in June, 1968 the United States Supreme Court overruled *Schwartz* and held that telephone wiretap evidence was inadmissible in a state criminal trial Lee v. Florida, 392 U. S. 378). And in October, 1968 it ruled that *Lee* was to be given prospective application (Fuller v. Alaska, 393 U. S. 80).

Appendix B

In 1969 respondents moved to suppress the evidence obtained through the 1966 wiretaps; and in 1970 they moved to dismiss the indictment on the ground that the other evidence was insufficient to support the charge. The motions were granted; the wiretap evidence was suppressed and the indictment was dismissed. The People have appealed.

The narrow issue on this appeal is whether the wiretap evidence is admissible since it was obtained before *Lee* (*supra*) but the trial was to be held after *Lee* was decided. In my opinion it is.

It is true that in *Fuller* (*supra*) which held that *Lee* (*supra*) was not to be applied retroactively, the Supreme Court used these words:

> "we hold that the exclusionary rule [of *Lee*] is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*" (p. 81).

But this language must be read with that used by the same court in the later cases of Kaiser v. New York (394 U. S. 280) and Desist v. United States (394 U. S. 244).*

In *Kaiser* the court said this (pp. 282-283):

> "Since the wiretapping in this case occurred before *Katz* was decided, * * * its fruits were not inadmissible under the exclusionary rule of the Fourth and Fourteenth Amendments."

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* *Kaiser* involved nontrespassory wiretapping and a state prosecution; *Desist* involved nontrespassory bugging and a federal prosecution; and both cases dealt with the retroactivity of the Supreme Court's recent holding in Katz v. United States (389 U. S. 347 [dec. Dec. 18, 1967]) that evidence obtained by nontrespassory eavesdropping was inadmissible, despite earlier holdings to the contrary.

And in *Desist* the majority said the following:

> "the convictions must * * * be reversed if *Katz* is to be applied to electronic surveillance conducted before the date of that decision. We have concluded, however, that to the extent *Katz* departed from previous holdings of this Court, it should be given wholly prospective application" (p. 246).
>
> * * *
>
> "we hold that *Katz* is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967" (p. 254).

Pointing up the rationale of its holding of nonretroactivity, the *Desist* majority noted (p. 253) that even before the decision in Mapp v. Ohio (367 U.S. 643) the state courts knew that unreasonable searches were unconstitutional, but that before *Katz* was decided nontrespassory electronic surveillance had not been considered unconstitutional. Commenting on this last point, Justice Fortas, dissenting, said (p. 274):

> "In *Kaiser* v. *New York*, the Court affirms a state conviction despite the fact that the conviction was based upon telephone conversations that the police had recorded by a wiretap * * * made pursuant to a warrant * * * on the assertion that the *Olmstead* doctrine [permitting such wiretaps] was fully viable at the time that the * * * telephone conversations were overheard."

Reading *Fuller* together with *Kaiser* and *Desist*, it seems plain to me that the present rule is that wiretap evidence obtained before *Lee* was decided is admissible at a state criminal trial, even if the trial was or is to be held

after the *Lee* decision. That is the situation in the case at bar and it therefore was error to suppress the wiretap evidence and dismiss the indictment because of insufficiency of the remaining evidence. Hence, the order suppressing evidence should be reversed insofar as appealed from and the order dismissing the indictment in question should be reversed and the motions for that relief denied.